

**THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

Before Commissioners: Shari Feist Albrecht, Chair
 Jay Scott Emler
 Dwight D. Keen

In the Matter of the Application of H & D) Docket No: 18-CONS-3344-CUIC
Exploration, LLC to authorize injection of saltwater)
into the Arbuckle formation at the Doonan "A" #2) CONSERVATION DIVISION
well, located in Section 28, Township 18 South,)
Range 13 West, Barton County, Kansas.) License No. 34674
_____)

ORDER ON APPLICANT'S MOTION TO DISMISS THE PROTESTS FILED HEREIN

This matter comes before the State Corporation Commission of the State of Kansas (Commission). Having examined its files and records, and being fully advised in the premises, the Commission finds and concludes as follows:

Background

1. On February 23, 2018, H & D Exploration LLC (H & D) filed an Application with the Commission seeking a permit to authorize the injection of saltwater into the Arbuckle formation at the Doonan 'A' lease, well number 2, located in Section 28, Township 18 South, Range 13 West, in Barton County, Kansas.¹ H & D published notice of its Application in the Great Bend Tribune newspaper on February 9, 2018.²

2. On February 23, 2018, Susan Royd-Sykes filed a letter of protest with the Conservation Division.

3. On February 26, 2018, Daniel Copp filed a letter of protest with the Conservation Division.

¹ Application for Injection Well, p. 1 (Feb. 23, 2018) (Application).

² Proof of Publication (Feb. 23, 2018).

4. On March 7, 2018, Scott Yeargain filed a letter of protest with the Conservation Division.
5. On March 13, 2018, Polly Shteamer filed a letter of protest with the Conservation Division.
6. On March 21, 2018, Steven D. Gough entered his appearance as counsel on behalf of Protestant, Warren L. Doonan, Trustee of the Warren L. Doonan Trust.
7. On March 21, 2018, the Warren L. Doonan Trust filed a letter of protest with the Conservation Division.
8. On March 27, 2018, the Commission issued its *Order Designating Prehearing Officer and Setting Prehearing Conference*, setting a Prehearing Conference for April 12, 2018.³
9. On March 28, 2018, John G. Pike entered his appearance as counsel on behalf of Warren L. Doonan, Trustee of the Warren L. Doonan Trust.
10. On April 12, 2018, a Prehearing Conference was held, during which the parties discussed a possible procedural schedule, and counsel for H & D indicated that H & D would be filing a Motion to Dismiss.
11. On April 13, 2018, H & D filed Applicant's Motion to Dismiss the Protests Filed Herein (Motion to Dismiss).
12. On April 26, 2018, Scott Yeargain filed a Motion to Accept Protests and Move to Hearing (Motion to Accept Protests).
13. On May 4, 2018, H & D filed a response to Mr. Yeargain's Motion to Accept Protests, incorporating the arguments and authorities in H & D's Motion to Dismiss and requesting denial of Mr. Yeargain's Motion to Accept Protests.⁴

³ *Order Designating Prehearing Officer and Setting Prehearing Conference*, Ordering Clause B (Mar. 27, 2018).

⁴ Applicant's Response to Protestant Scott Yeargain's Motion to Accept Protests and Move to Hearing, p. 1 (May 4, 2018).

14. On May 7, 2018, Warren L. Doonan, Trustee of the Warren L. Doonan Trust, withdrew its protest in this matter.⁵

Legal Standards

15. K.A.R. 82-3-135a(e) requires a protestant to file a “valid protest.” According to K.A.R. 82-3-135b(a), a valid protest is one that “include[s] a clear and concise statement of the direct and substantial interest of the protester in the proceeding, including specific allegations as to the manner in which the grant of the application will cause waste, violate correlative rights, or pollute the water resources of the state of Kansas.” A protestant can only show a “direct and substantial interest” in the Application where the protestant demonstrates that, “[1] he or she suffered a cognizable injury and [2] that there is a causal connection between the injury and the challenged conduct.”⁶ “A cognizable injury is established by showing . . . that [an individual] personally suffers some actual or threatened injury as a result of the challenged conduct . . . [and] . . . [t]he injury must be particularized, *i.e.*, it must affect the plaintiff in a personal and individual way.”⁷ “Mere allegations of possible future injury do not meet the requirements of standing and instead, any threatened injury must be certainly impending.”⁸ Moreover, “an injury must be more than a generalized grievance common to all members of the public.”⁹

Findings and Conclusions

16. In its Motion to Dismiss, H & D relied on the reasoning in the Commission’s *Final Precedential Order* in the 17-CONS-3689-CUIC Docket (17-3689 Docket) to argue that “[t]he

⁵ Notice of Withdrawal of Protest, p. 1 (May 7, 2018).

⁶ See *Kansas Bldg. Indus. Workers Comp. Fund v. State*, 302 Kan. 656, 678, 359 P.3d 33, 49 (2015) (citations and internal quotations omitted). See also Docket No. 17-CONS-3689-CUIC, *Final Precedential Order*, ¶ 3 (Apr. 5, 2018).

⁷ See *FV-I, Inc. for Morgan Stanley Mortg. Capital Holdings, LLC v. Kallevig*, 306 Kan. 204, 212, 392 P.3d 1248, 1255–56 (2017) (internal citations and quotations omitted). See also Docket No. 17-CONS-3689-CUIC, Written Findings and Recommendations, ¶ 29 (Mar. 29, 2018).

⁸ See also *Labette Cty. Med. Ctr. v. Kansas Dep’t of Health & Env’t*, 2017 WL 3203383 at *8 (unpublished), 399 P.3d 292 (Kan. Ct. App. 2017). See also Docket No. 17-CONS-3689-CUIC, Written Findings and Recommendations, ¶ 29.

⁹ *Labette Cty. Med. Ctr.* 2017 WL 3203383 at *10 (internal citations and quotations omitted).

protests by Susan Royd-Sykes, Daniel Copp, Scott Yeargain, and Polly Shteamer do not satisfy K.A.R. 82-3-135b because they do not demonstrate, even by a prima facie showing, that these protestants meet the ‘direct and substantial interest’ standard.”¹⁰ H & D argued that these protests “fall squarely in the category of protests rejected by the Commission in its Final Precedential Order”¹¹ because they do not allege “an individual, personal, particularized and impending injury. These protests also fail to demonstrate a causal connection between such alleged injury and the proposed injection activity.”¹²

17. H & D argued that Ms. Sykes, Mr. Copp, Mr. Yeargain, and Ms. Shteamer “do not reside within any reasonable proximity to the subject Doonan ‘A’ #2 well . . . nor have these protestants demonstrated a direct nexus to the Applicant’s operations of the Doonan ‘A’ #2 well.”¹³ H & D also asserted that allowing these protests to remain would “improperly usurp[] the role of the Commission’s technical staff.”¹⁴

18. Ms. Royd-Sykes’ protest letter expressed a generalized concern regarding the ecosystem of the Cheyenne Bottoms Wildlife Refuge,¹⁵ the cleanliness of Great Bend’s water reservoirs,¹⁶ and earthquakes in Barton County.¹⁷ Ms. Royd-Sykes’ letter did not provide specific allegations as to the manner in which the grant of this particular Application will pollute Kansas’ water resources.¹⁸ Her letter did not provide evidence that she has personally suffered injury, nor that she has expressed anything other than a generalized concern common to all members of the public.¹⁹ At most, her letter advanced mere allegations of speculative future injury, which does not meet the

¹⁰ Motion to Dismiss, ¶ 5.

¹¹ Motion to Dismiss, ¶ 5.

¹² Motion to Dismiss, ¶ 5.

¹³ Motion to Dismiss, ¶ 6.

¹⁴ Motion to Dismiss, ¶ 7.

¹⁵ Royd-Sykes Protest Letter, p. 1.

¹⁶ Royd-Sykes Protest Letter, p. 1.

¹⁷ Royd-Sykes Protest Letter, p. 1.

¹⁸ See ¶ 15 of this Order, *supra*.

¹⁹ *Id.*

regulatory standard for protests.²⁰ Thus, the Commission finds that Ms. Royd-Sykes has not filed a valid protest pursuant to K.A.R. 82-3-135b(a).

19. Mr. Copp's protest letter is virtually identical to Ms. Royd-Sykes' letter, sharing much of the same verbiage, and therefore, the Commission finds Mr. Copp's protest is invalid for the reasons provided in the previous paragraph.

20. Ms. Shteamer's protest letter asserted her thought "that perhaps the KCC is out of compliance with CFR 144.32."²¹ Ms. Shteamer offered some tentative guesses as to whether "both the KCC and H&D are out of compliance with the EPA mandate,"²² but she did not point to any *Kansas* law with which the Commission may perhaps be out of compliance. Ms. Shteamer complained that her insurance "will not protect us from seismic events induced by human activity," and alleged that "[d]ecently good evidence indicates that high-volume injection into deep subsurface layers is correlated, nay, causally related to, seismic events."²³ The Commission finds that, other than her brief discussion of earthquakes, Ms. Shteamer did not attempt to provide a clear and concise statement of her direct and substantial interest in this proceeding nor any specific allegations as to the manner in which the grant of this particular Application will cause waste, violate correlative rights, or pollute Kansas' water resources.²⁴ Were the Commission to accept Ms. Shteamer's generalized standard regarding human-induced seismicity, it would bar *any* injection well from ever being permitted in Kansas. Thus, the Commission finds that Ms. Shteamer has not filed a valid protest.

21. Mr. Yeargain filed an identical protest letter to Ms. Shteamer. Thus, the Commission finds his protest letter to be invalid on the same basis as hers.

²⁰ *Id.*

²¹ Shteamer Protest Letter, p. 1.

²² *Id.*

²³ *Id.*

²⁴ See ¶ 15 of this Order, *supra*.

22. The Commission also rejects Mr. Yeargain's Motion to Accept Protests and Move to Hearing. Mr. Yeargain's implication that an applicant for a saltwater injection well must communicate with the Chief Engineer of Walnut Creek IGUCA²⁵ does not comport with the Commission's exclusive jurisdiction and authority to regulate oil and gas activities.²⁶ In addition, the plain meaning of K.A.R. 82-3-135b(a) and Kansas case law²⁷ by themselves provide an adequate basis for dismissing Mr. Yeargain's protest.²⁸ Thus, the Commission finds moot his arguments regarding the alleged inapplicability of the Commission's *Final Precedential Order* in the 17-3689 Docket.²⁹ The Commission is unpersuaded by Mr. Yeargain's arguments that H & D "offer[ed] no evidence that any or all of these four protestants have no commercial, personal, legal, or fiduciary interests in the proximity of Doonan A #2"³⁰ and that "protestants have not been shown by applicant to be immune to the deleterious effects of such operations."³¹ The burden of demonstrating a direct and substantial interest in the proceeding is on the protestant, not on the applicant.³² Moreover, nowhere do the Kansas oil and gas regulations require an applicant to prove a negative, as Mr. Yeargain asserted. As stated above, the Kansas UIC program is not regulated by the Kansas Water Appropriation Act,³³ and Mr. Yeargain's seismicity arguments³⁴ fail for the same reason provided in paragraph 20 above. Finally, Mr. Yeargain's arguments on behalf of the Doonan Trust protest³⁵ are

²⁵ See Motion to Accept Protests and Move to Hearing, ¶¶ 1-3. (Motion to Accept Protests).

²⁶ See K.S.A. 74-623(a). See also K.S.A. 55-901(a) (providing "[t]he owner or operator of any oil or gas well which may be producing and which produces salt water or waters containing minerals in an appreciable degree" with "the right to return such waters to any horizon from which such salt waters may have been produced, or to any other horizon which contains or had previously produced salt water or waters containing minerals in an appreciable degree" where the owner or operator applies to *the Commission* and approval is granted after *the Commission's* investigation) (Emphasis added).

²⁷ See footnotes 6-9 of this Order, *supra*.

²⁸ Thus, Mr. Yeargain was not "labor[ing]" solely "under a Precedential Order which was nonexistent during the entirety of the protest period in this docket." See Motion to Accept Protests, ¶ 5.

²⁹ See Motion to Accept Protests, ¶ 5.

³⁰ Motion to Accept Protests, ¶ 6.

³¹ Motion to Accept Protests, ¶ 7.

³² See K.A.R. 82-3-135b(a).

³³ See Motion to Accept Protests, ¶¶ 8-9.

³⁴ See Motion to Accept Protests, ¶ 10.

³⁵ See Motion to Accept Protests, ¶ 11.

moot because the Doonan Trust withdrew its protest. Therefore, the Commission denies Mr. Yeargain's Motion to Accept Protests.

23. Based on the above, the Commission finds the protests of Susan Royd-Sykes, Daniel Copp, Scott Yeargain, and Polly Shteamer shall be dismissed. There are no other protests of record in this matter. As such, Staff is directed to process H & D's Application accordingly and advise the Commission if, in Staff's opinion, a hearing is necessary. Otherwise, the docket shall be closed, and there shall be no further proceedings.

THEREFORE, THE COMMISSION ORDERS:

A. H & D's Motion to Dismiss the Protests Filed Herein is granted. Staff shall process the Application accordingly.

B. Any party affected by this Order may file with the Commission a petition for reconsideration pursuant to K.S.A. 77-529(a) and K.S.A. 55-162. The petition shall be filed within 15 days after service of this Order, plus three days if mailed service, and must state the specific grounds upon which relief is requested. The petition shall be addressed to the Commission and sent to 266 N. Main, Ste. 220, Wichita, Kansas 67202.

C. The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Albrecht, Chair; Emler, Commissioner; Keen, Commissioner

Dated: 05/10/2018 _____



Lynn M. Retz
Secretary to the Commission

Mailed Date: 05/11/2018 _____

MJD

CERTIFICATE OF SERVICE

18-CONS-3344-CUIC

I, the undersigned, certify that the true copy of the attached Order has been served to the following parties by means of electronic service on 05/10/2018.

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CERTIFICATE OF SERVICE

18-CONS-3344-CUIC

/s/ DeeAnn Shupe

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